IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Advanced Manufacturing Technologies, Inc., an Arizona corporation,

Plaintiff,

vs.

Motorola, Inc., a Delaware corporation,

Defendant.

No. CIV 99-01219 PHX-MHM (LOA)

ORDER

This matter arises on the referral[1] of Non-Party M. Dean Corley's Rule 26(c) Motion For Protective Order And Motion To Disqualify Defense Counsel (doc. #164). The Court has reviewed and considered the subject motion, Defendant Motorola's Response in opposition thereto, and Corley's Reply. Corley alleges that defense counsel and his firm have

[1] A magistrate judge's lawful authority to rule on a disqualification motion falls within the "pretrial duties" or "additional duties" delegated to magistrate judges under the Federal Magistrates Act. See, 28 U.S.C. §636(b)(1)(A);Affeldt v. Carr, 628 F.Supp. 1097 (N.D.Ohio 1985), aff'd., 827 F.2d 769 (6th Cir.1987)(Because an order disqualifying counsel is a non-case-dispositive matter it may be handled by a magistrate judge as a pre-trial duty under 28 U.S.C. §636(b)(1)(A)); Estate of Jones v. Beverly Health And Rehabilitation Services, Inc., 68 F.Supp.2d 1304 (N.D. Fla. 1999).

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an irreparable conflict of interest[2] that requires, among others, defense counsel and his law firm be disqualified from further representation of Motorola. The Court concludes that the motion should be granted in part and denied in part.

Having resolved other motions herein, the Court is now generally familiar with the basic facts and claims of the parties. Thus, the Court will not detail the overall facts and claims except as may be relevant to the subject motion. In his motion, Merlin Dean Corley ("Corley"), a non-party at this time, claims that Douglas L. Irish ("Irish"), a senior lawyer with the Phoenix law firm of Lewis and Roca, LLP, who has represented Motorola in this litigation since, at least, it was removed from the Maricopa County Superior Court on July 6, 1999, should be disqualified, along with his firm, from further representation of Defendant. Corley, a long-time employee of Motorola now retired, alleges that he was individually represented by Irish and Lewis and Roca in this action at his two depositions. He argues that Irish and Motorola viewed him as an important factual witness to events and circumstances surrounding Motorola's machine shop and Plaintiff Advanced Manufacturing Technologies, Inc.'s ("AMT") suit against Motorola. After several private conferences and phone calls with Irish, Corley appeared for his videotaped depositions, noticed by Plaintiff's counsel, on September 20, 2001 and November 27, 2001. Irish appeared at each deposition, announcing on the record that he represented Motorola. When asked by Plaintiff's counsel at his first deposition whether Corley was represented at the deposition, Corley testified that he was represented by Irish and his firm.[3] The record confirms that Irish remained silent and

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[2] The basic rule prohibiting conflicts reads:

> Unless all affected clients and other necessary persons consent to the representation ... a lawyer may not represent a client if the representation would involve a conflict of interest. A conflict of interest is involved if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person.

Restatement (Third) of the Law Governing Lawyers §121.

[3] (By John DeWulf)
Q: Let me just ask for the record: Are you represented by counsel today?
(By Corley)

did not deny or otherwise qualify Corley's affirmative response. For these and other reasons set forth in his motion, Corley urges the Court to disqualify Irish and his firm from not only taking his deposition now that Corley's interests are adverse to Motorola's but also from bringing suit against Corley and from further representation of Motorola in this matter.

In their opposition, Irish denies that Corley was ever an individual client of his or his firm in this or any other legal matter. Irish contends that his only client in this case is Motorola, the only defendant in this lawsuit.[4] Irish asserts that he and his law firm appeared at Corley's depositions only on behalf of his corporate client, Motorola, Corley's former employer. Irish explains that Corley's depositions were noticed and taken by Plaintiff's counsel and dealt with Corley's actions while employed as a manager of Motorola's machine shop. Moreover, Irish alleges that the conflict in positions between Corley and Motorola has only recently developed and become known to him "when the truth about Corley's misbehavior started unfolding nearly four months later."[5] Irish and his declaration indicate that neither he nor Motorola had any "expectation that [Corley's] interests would become

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A: Yes.
Q: Is that Mr. Irish and his firm?
A: Yes.
Q: And have you met with counsel - in anticipation of your deposition today?
A: There was a meeting, yes.
Q: How many times did you meet with counsel?
A: Twice.
Q: Would that be - you met with counsel a total of two times in connection with this litigation?
A: No.
Q: How often would you have met with him in connection with this litigation?
A: In person, I'm remembering two additional times. Four times.
Q: And then you spoke on the phone on occasion?
A: There's been conversations on the phone.
Q: Any estimate about how many times you spoke on the phone with counsel?
A: I'm remembering six to eight.

See page 185, line 11 through page 186, line 10, deposition of September 20, 2001; Exhibit G, Corley's Motion.

[4] Corley's Motion and Reply indicates that Irish and his firm have threatened to pursue a claim or lawsuit against him "for alleged damages Motorola believes it incurred, or may incur, as a result of Mr. Corley's alleged conduct." See p. 4, l. 2-3, Corley's Motion.

[5] See p. 11, l. 6-7, Defendant's Response.

adverse" to Motorola's until further discovery and an interview with Patrick Johns subsequent to Corley's depositions which made Irish "aware of facts which might lead to a claim by Motorola against Mr. Corley arising from his acts and omissions in connection with the transaction at it issue in this lawsuit."[6] The Court believes that Irish is referring to the alleged secret agreement between Corley and Mike Harris that Corley would allegedly go to work for AMT if AMT were the successful bidder and purchaser of Motorola's machine shop. Irish argues that Corley should not benefit by Irish's disqualification caused by Corley's alleged lack of candor and truthfulness to Irish prior to Corley's depositions that prevented Irish from learning early on that Corley and Motorola had adverse interests and that precluded Irish from instructing Corley that he needed independent counsel and advising him that neither Irish nor any member of his law firm could represent him.[7]

MOTIONS TO DISQUALIFY IN FEDERAL COURT CASES

The Seventh Circuit[8] has noted repeatedly "two important considerations invoked in motions to disqualify counsel and [has] emphasized the delicacy of the balance that must be maintained between them: the sacrosanct privacy of the attorney-client relationship (and the professional integrity implicated by that relationship) and the prerogative of a party to proceed with counsel of its choice." Schiessle v. Stephens, 717 F.2d 417, 419-20 (7th Cir.1983); Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263 (7th Cir.1983); LaSalle National Bank v. County of Lake, 703 F.2d 252 (7th Cir.1983); Freeman v. Chicago Musical Instrument Co., 689 F.2d 715 (7th Cir.1982). Moreover, disqualification is a "drastic measure which courts should hesitate to impose except when absolutely necessary" because "disqualification of counsel, while protecting the attorney-client relationship, also serves to destroy a relationship by depriving a party of representation of their own choosing."

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[6] Exhibit A, ¶ 19, Defendant's Response.

[7] See ¶¶ 20- 21, Exhibit A, Defendant's Response.

[8] The Ninth Circuit has published very few opinions on the disqualification of adverse counsel in civil litigation.

Freeman, 689 F.2d at 721; Alexander v. Superior Court, 141 Ariz. 157, 161, 685 P.2d 1309, 1313 (1984)(used "[o]nly in extreme circumstances"). Even when made in good faith, such motions inevitably cause delay, contrary to Rule 1, FED.R.CIV.P. Board of Education of New York City v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979) Accordingly, the burden of persuasion is upon the moving party to show sufficient reason why an attorney should be disqualified from representing his or her client. Alexander, 685 P.2d at 1313; Dayco Corporation Derivative Securities Litigation, 102 F.R.D. 624, 628 (1984).

Motorola's reference to the federal case of Cole v. Ruidoso Municipal Schools, 43 F.3d 1373, 1383 (10th Cir. 1994) provides the Court with an excellent starting point for its analysis whether an impermissible conflict of interest has developed for defense counsel:

> Motions to disqualify are governed by two sources of authority. First, attorneys are bound by the local rules of the court in which they appear. Federal district courts usually adopt the Rules of Professional Conduct of the states where they are situated. Second, because motions to disqualify counsel in federal proceedings are substantive motions affecting the rights of the parties, they are decided by applying standards developed under federal law. In re American Airlines, Inc., 972 F.2d 605, 610 (5th Cir.1992), cert. denied sub nom. Northwest Airlines, Inc. v. American Airlines, 507 U.S. 912, 113 S.Ct. 1262, 122 L.Ed.2d 659 (1993). Therefore, motions to disqualify are governed by the ethical rules announced by the national profession and considered "in light of the public interest and the litigants' rights." See [In re Dresser Industries, Inc.], 972 F.2d 540, 543 (5th Cir. 1992)].

Cole at 1383.

The District Court of Arizona has adopted the Rules of Professional Conduct approved by the Supreme Court of the State of Arizona. See Local Rule 1.6(d), Rules of Practice for the United States District Court for the District of Arizona. The Arizona Supreme Court has, in turn, adopted, with some modifications, the Model Rules of Professional Conduct of the American Bar Association. 17A, A.R.S., Sup.Ct. Rules, Rules of Professional Conduct, Rule 42; Research Corporation Technologies, Inc. v. Hewlett-Packard Company, 936 F. Supp. 697, 700 (D.Az. 1996).

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Arizona Ethical Rule ("ER") of Professional Conduct 1.9 provides:

> A lawyer who has formerly represented a client in a matter shall not thereafter:
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> (a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or
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> (b) use information relating to the representation to the disadvantage of the former client except as ER 1.6 [governing confidentiality of information] would permit with respect to a client or when the information has become generally known.

Rule 42, Az. Sup. Ct.R. 1.9. Generally, the Arizona Rules of Professional Conduct were patterned after the ABA Model Rules of Professional Conduct, rules that reflect the national standard used by federal courts in ruling on disqualification motions. Arizona's ER 1.9, however, does not materially differ from the ABA Rule. See ABA Model Rule 1.9(a) & (c). Thus, case law applying ABA Model Rule 1.9 is instructive.

A person or entity seeking to disqualify opposing counsel based upon an impermissible conflict of interest due to a former representation must establish the following three elements:

> (1) an actual attorney-client relationship existed between the moving party and the opposing counsel;
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> (2) the present litigation involves a matter that is "substantially related" to the subject of the movant's prior representation; and
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> (3) the interests of the opposing counsel's present client are materially adverse to the movant.

See ABA Model Rule 1.9(a) & (c); Koch v. Koch Industries, 798 F.Supp. 1525, 1532 (D.Kan.1992); English Feedlot, Inc. v. Norden Laboratories, Inc., 833 F.Supp. 1498, 1506 (D.Colo.1993) (setting out elements for disqualification pursuant to Rule 1.9); Gates Rubber Co. v. Bando Chemical Industries, Ltd., 855 F.Supp. 330 (D.Colo.1994); Cole, 43 F.3d at 1383-1384; In re American Airlines, 972 F.2d at 614 (describing elements of Fifth Circuit's test for disqualification).

In this case the threshold question is whether Corley has established the first element, i.e., whether there was, in fact, an attorney-client relationship between Irish and

Corley which subjects Irish and his firm to the ethical obligation of avoiding an impermissible conflict of interest between their former client (Corley) and their current client (Motorola). Most of the Court's discussion herein will focus on this critical element because Corley does not consent to Irish's continued representation of Motorola. The second two elements, however, are undisputed in this case. Obviously, a third-party suit under Rule 14, FED.R.CIV.P., or a separate lawsuit filed on behalf of Motorola against Corley for indemnification or contribution for the damages, if any, Motorola may be required to pay to Plaintiff in this litigation would directly relate to the subject matter of this litigation and would be patently adverse to Corley's interests.

ESTABLISHING AN ATTORNEY-CLIENT RELATIONSHIP

For there to have been an attorney-client relationship, the parties need not have executed a formal contract. Westinghouse Electric Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1317 (7th Cir.), cert. denied, 439 U.S. 955, 99 S.Ct. 353, 58 L.Ed.2d 346 (1978)); Paradigm Insurance Company v. Langerman Law Offices, P.A., 200 Ariz. 146, 148, 24 P.3d 593, 595 (2001)("The law has never required that the attorney-client relationship must be initiated by some sort of express agreement, oral or written."). Nor is the existence of such a relationship dependent upon the payment of fees. Allman v. Winkelman, 106 F.2d 663, 665 (9th Cir. 1939), cert. denied, 309 U.S. 668, 60 S.Ct. 608, 84 L.Ed. 1014 (1940) ("lawyer's advice to his client establishes a professional relationship though it be gratis").

The Restatement (Third) of the Law Governing Lawyers, a widely respected national treatise which undoubtedly reflects the national standard in this area which has also been adopted with approval by the Arizona Supreme Court in Paradigm, is illustrative on when an attorney-client relationship may be formed.

A relationship of client and lawyer arises when:

> (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either
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> (a) the lawyer manifests to the person consent to do so; or

> (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services;

§14, The Restatement (Third) of the Law Governing Lawyers. Morever, comment c to section 14 indicates that either intent or acquiescence may establish an attorney-client relationship. Thus, based on both the Restatement and Paradigm, a purported client's belief that the lawyer was their attorney is crucial to the existence of an attorney-client relationship, so long as that belief is "objectively reasonable."

Other federal courts have held that a party establishes an implied attorney-client relationship if the party shows (1) that the party submitted confidential information to a lawyer, and (2) that the party did so with the reasonable belief that the lawyer was acting as the party's attorney. Westinghouse, 580 F.2d. at 1319-20; Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263, 1268-69; DCA Food Industries, Inc. v. Tasty Foods, Inc., 626 F.Supp. 54, 59-60 (W.D.Wis.1985); Kearns v. Fred Lavery Porsche Audi Co., 745 F.2d 600, 603 (D.C.Cir.1984), cert. denied, 469 U.S. 1192, 105 S.Ct. 967, 83 L.Ed.2d 971 (1985). Nelson v. Green Builders, Inc., 823 F.Supp. 1439, 1445 (D.C. Wis. 1993).

ANALYSIS

Except for drawing differing conclusions, Corley's and Irish's facts are not materially in dispute. Thus, an evidentiary hearing is not necessary. Corley's affidavit indicates that upon learning of the existence of this lawsuit, he concluded that he would likely be a material witness in the case due to his "direct oversight" of the machine shop and his efforts to sell, or outsource, it. Although retired from Motorola since February, 1999, Corley claims he "believed that as a Motorola employee, [h]e would be included, on an individual basis, in the legal representation Motorola secured in the case to defend against AMT's claims"[9] and Irish "would represent me at my deposition."[10] His affidavit further details the confidential meetings in the lawyers' offices and the alleged open communications

[9] See ¶ 5, lines 16-18, Exhibit B to Corley's motion (doc. #164).

[10] Id., ¶ 8, line 13.

of the facts he had with Irish and other members of the Lewis & Roca firm under the "same belief that [Irish] was my attorney in the matter."[11] Corley's affidavit also indicates how, in preparation for his then upcoming deposition, the law firm "provided me with specific guidance (legal advice) regarding the deposition process, likely deposition questions, and approaches to answering questions."[12] He asserts that at no time during his deposition did "anyone from Lewis & Roca inform me that my understanding of its representation of me on an individual basis was erroneous or otherwise mistaken."[13] It was not until after his depositions, sometime in January 2002, when he called Irish to discuss Corley's review of his deposition transcript did Irish inform him that Corely "would be well-advised to retain different counsel."[14]

Irish's declaration confirms not only the pre-deposition meetings and conversations between Corley and Irish but also that the issue of Corley being represented by Irish and his firm was not expressly discussed between them. Irish indicates that Corley did not ask or suggest that Irish act as his individual attorney and that Irish never stated anything that would lead Corley to believe that Irish would not fully disclose to Motorola everything Corley disclosed to him. Irish asserts in his declaration that his and his firm's communications to Corley "were solely in its role as counsel for Motorola communicating under Motorola's corporate attorney-client privilege with a former Motorola employee who had retired from the company."[15]

While it is uncontested that Corley has never been a named-party in this litigation, the Court concludes that an attorney-client relationship was impliedly created between

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[11] Id., ¶ 6, lines 20-21.

[12] Id., ¶ 8, lines 10-11.

[13] Id., ¶ 9, lines 20-22.

[14] Id., ¶ 11.

[15] See ¶ 9, Exhibit A, Defendant's Response (doc. #180).

Corley and Irish and his law firm on September 20, 2001 that relates back to their first communications regarding Corley's then upcoming deposition. Regardless of whether Corley's personal belief that Irish represented him was reasonable prior to the September 20, 2001 deposition, the irrefutable expressed belief by Corley that Irish represented him in his deposition[16] coupled with Irish's silent acquiescence to that representation established an attorney-client relationship ab initio. Irish's failure to timely object to, or otherwise contest, Corley's explicit belief, whether reasonable or not, that Corley was being represented by Irish in his deposition manifested Irish's implied consent to an attorney-client relationship between them. Moreover, at a minimum, Irish should have known that his silence to Corley's expressed belief in the deposition that Irish represented him would cause confirmation and further reliance by Corley to the belief that Irish represented him. An attorney can not have it both ways: on the one hand to sit by silently at the public expression by a possible client of the existence of their attorney-client relationship, that would preclude adverse counsel from properly inquiring into the nature and substance of their prior communications protected by the attorney-client privilege, and then, at a later date, to permit that silent attorney to disavow and deny that such a relationship existed when the interests of the former employer and employee unexpectedly became adverse. Therefore, on and after this deposition date until expressly told otherwise, Corley's belief that Irish represented both Motorola and him was reasonable. Additionally, the fact that Corley never signed any fee agreement nor paid Irish or his firm for his representation at his depositions is not controlling and do not preclude the Court from concluding that an attorney-client relationship was impliedly created between them.

The undisputed evidence also shows that Corley manifested his intent to be represented by Irish when he voluntarily appeared at Irish's law office without a subpoena and communicated freely and openly, in Corley's view at least, with Irish and other lawyers at Lewis & Roca in preparation for his upcoming deposition. There is no evidence that has

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[16] See footnote 3, supra.

been proffered to the Court to dispute Corley's affidavit testimony that "[h]ad I known that Lewis & Roca would later deny it represented me individually . . . , I would not have made the type of communications, both in nature and scope, to Lewis & Roca described above."[17]

Presumably as a basis to deny the motion, Irish argues that Corley does not identify or disclose in what way or context that Corely would not have made the type of communications he did had he known that Irish was not representing him. Corley, however, need not make such a showing in order for the Court to find that an attorney-client relationship existed between them. In order to protect client confidentiality, the party moving for disqualification need not reveal the substance of his communication to the lawyer, for this would defeat the purpose of the disqualification. Smith v. Whatcott, 757 F.2d 1098, 1100 (10th Cir.1985) (discussing the presumption that arises once a "substantial relationship" has been found between the present litigation and the former matter); Cole, 43 F.3d at 1384. Usually, a showing of the circumstances and subject of the consultation, as has been made by Corley herein, will be enough to demonstrate whether the information was confidential. See, e.g., Westinghouse, 580 F.2d at 1319 (giving examples of when an implied professional relationship is created).

The Court concludes that Corley has established that he communicated confidential information to Irish prior to his depositions and that he did so with the reasonable belief that Irish and Lewis & Roca were acting as both his and Motorola's lawyers. The Court is not unmindful, however, of how Irish may have been intentionally misled by Corley if Irish's representations that Corley was not truthful with him are true. Regardless whether Motorola can afford it, disqualifying Irish and his firm[18] at this time from

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[17] ¶ 7, lines 3-5, Exhibit B to Corley's motion (doc. #164).

[18] No other attorney from Lewis & Roca may represent Motorola for any attorney within the law firm is presumed to have learned the confidences of all of the firm's clients. Freeman, 689 F.2d at 722; Laskey Bros. of W. Va. v. Warner Bros. Pictures, Inc., 224 F.2d 824, 826 (2nd Cir.1955), cert. denied 350 U.S. 932 (1956); Model Rules of Professional Conduct and Arizona ER 1.10 essentially extend a lawyer's conflicts of interest to his

further representation of Motorola in this 3-year old litigation will be costly to Motorola as Motorola may be required to retain another lawyer from a different firm to represent Motorola which will further delay resolution of this case. In a effort to balance the equities and hardship created to Motorola due to defense counsel's present conflict between dual clients with apparently adverse interests, the Court is willing to consider entering a future screening order based upon Motorola's request that would permit Irish and his firm to continue to represent Motorola, provided certain safeguards were imposed by Court order and strictly adhered to by counsel, that would ensure the protection of Corley's interests were Irish and his firm permitted to stay on the case.[19]

Accordingly,

IT IS ORDERED that Non-Party M. Dean Corley's Rule 26(c) Motion For Protective Order (doc. #164) is **GRANTED**. Attorney Douglas L. Irish and the law firm of Lewis & Roca, LLP, are hereby precluded from taking or otherwise participating in M. Dean Corley's future deposition, if any, due to their impermissible conflict of interest between dual clients, Motorola and Corley, whose interests at this time appear to be materially adverse. Whether Irish may be permitted to examine or cross examine Corley at time of trial will abide by further order of the trial judge.

IT IS FURTHER ORDERED that M. Dean Corley's Motion To Disqualify Defense Counsel (doc. #164) is **DENIED without prejudice** because Douglas L. Irish and the law firm of Lewis & Roca have not filed suit against Corley at this time. To rule on the

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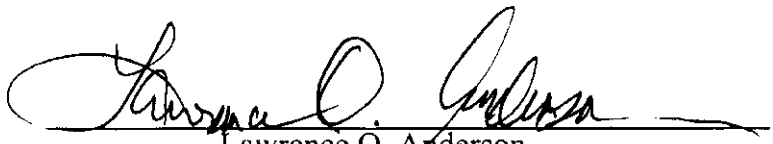
partners.

[19] Although Arizona courts do not recognize screening orders or devices, Smart Industries Corp., Mfg., v. Superior Court, 179 Ariz. 141, 876 P.2d 1176 (App. 1994), sometimes referred to as "Chinese Walls," or "cones of silence," federal courts have been less reluctant to implement them. LaSalle National Bank v. County of Lake, 703 F.2d 252 (7th Cir. 1983); Armstrong v. McAlpin, 625 F.2d 433 (2nd Cir. 1980), vacated on other grounds, 449 U.S. 1106 (1981).

merits of future events that have not yet occurred would, in the Court's view, constitute an impermissible advisory opinion.

IT IS FURTHER ORDERED that M. Dean Corley's request for an award of attorney's fees incurred by Corley to bring this motion pursuant to Rules 26(c) and 37(a)(4), FED.R.CIV.P., is **DENIED** on the grounds of the novel issue presented herein would render an award of fees unjust under the circumstances.

DATED this 2nd day of July, 2002.



Lawrence O. Anderson
United States Magistrate Judge